Office-Supreme Court, U.S.
FILED
JUN 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, EX REL.,
JOEL D. JOSEPH
AND
JOEL D. JOSEPH,

Petitioners,

v.

HOWARD W. CANNON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWARD P. MORGAN
(Counsel of Record)
KEVIN T. MARONEY
WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 296-5151
Attorneys for Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

RESTATEMENT OF THE QUESTION PRESENTED 2

STATEMENT 2

ARGUMENT 5

CONCLUSION 11

CITATIONS

Cases:

Baker v. Carr, 396 U.S. 186 (1962) 4, 5

Duke Power Co. v. Carolina Env. Study Group, 348 U.S. 59 (1978) 10

Mulqueeny v. National Commission on the Observance of International Women's Year, 549 F.2d 1115 (7th Cir., 1977) 10

Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (1970) 9

Winpisinger v. Watson, 628 F.2d 133, at 141 (C.A.D.C. 1980) 10

Statute and Rule:

False Claims Act, 31 U.S.C. 231, *et seq.* 2, 4

Rule 9(b) Federal Rules of Civil Procedure 3, 4

Miscellaneous:

Senate Manual, 93rd Cong. 1st Sess., Sen. Doc. No. 93-1, 1973 7

114 Cong. Rec. 6838-6839 (1968) 8

S. Report No. 95-500, 95th Cong. 1st Sess., p. 2. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2036

UNITED STATES OF AMERICA, EX REL.,
JOEL D. JOSEPH
AND
JOEL D. JOSEPH,

Petitioners,

v.

HOWARD W. CANNON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is not reported; it is reproduced in the Appendix to the Petition at pp. 29a-30a. The opinion of the court of appeals is not yet reported, and is reproduced in Petitioner's Appendix at pp. 1a-28a.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1981. Petitioners' timely petition for rehearing was denied March 2, 1981. The petition for certiorari was

filed on June 1, 1981. The jurisdication of this court is invoked under 28 U.S.C. 1254(i).

RESTATEMENT OF THE QUESTION PRESENTED

Whether the False Claims Act grants a cause of action to a *qui tam,* plaintiff on allegations that a staff member of a Senator "worked extensively and exclusively" on the Senator's reelection campaign and accepted his pay even though his legislative duties "were not performed or otherwise performed in a perfunctory or nominal manner" when the Senate itself has refused to curtail such activities by staff employees and, indeed, has sanctioned such activities?[1]

STATEMENT

The complaint in this case,which was filed in the district court by petitioner Joel D. Joseph as relator in the name of the United States, is predicated on the False Claims Act, codified at 31 U.S.C. 231, *et seq.,* relating to liability of persons making false claims against the government.

The act permits a private citizen to initiate such a suit. Pursuant to procedures, petitioner furnished the United States with information in his possession relating to the case, after which the Department of Justice notified the district court that the United States "declines to enter an appearance in this litigation or to otherwise assume responsibility for its continued prosecution." (Appellant's App. in the court below, p. 13).

---

[1]The second question presented in the petition for writ of certiorari is completely inappropriate since the Complaint did *not* allege that Senator Cannon "directed a member of his legislative staff to work exclusively on his reelection campaign."

The Complaint alleges that paragraphs 8 through 10 thereof constitute violations of the False Claims Act. Those Paragraphs are as follows:

> "8. From March of 1975 to November, 1976, defendant Sobsey worked extensively and exclusively on Senator Cannon's re-election campaign or campaign-related tasks which were not part of Senator Cannon's official legislative and representational duties.
>
> 9. During this period of time, Senator Cannon's authorized payment of and defendant Sobsey accepted his regular pay for services ostensibly performed as Senator Cannon's administrative assistant even though such services were not performed or otherwise performed in a perfunctory or nominal manner. Such payments were knowingly made by Senator Cannon and knowingly received by Chester Sobsey.
>
> 10. During the period of time alleged in paragraph 8 and at other times, defendant Cannon had other members of his staff perform personal services to him and his family which were not part of Senator Cannon's official legislative and representational duties, but were nevertheless paid with public funds."
> (Appellant's App. in the Court of Appeals p. 8).

In the district court the respondents moved to dismiss the complaint on the grounds that: (1) it fails to allege with particularity the circumstances constituting the alleged fraud as required by Rule 9(b), Federal Rules of Civil Pro-

specter" of the presence of a political question not suitable for judicial scrutiny (Pet. App., p. 11a), the court of appeals without success looked for discernible rules or standards in statutory, administrative or case law and in the treatment of the subject by the Senate itself. In connection with the latter, the court below noted that the Senate Committee on Rules and Administration in 1977 concluded, after a review of the matter, that "[o]ther than the actual handling of campaign funds, the Senate has not imposed any restrictions on the participation of a member of a Senator's staff in that Senator's reelection campaign." (Pet. App., pp. 20a-21a).

The court of appeals concluded:

> "In the absence of any discernible legal standard — or even of a congressional policy determination — that would aid consideration and decision of the question raised by appellant's first count, we are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch. We are unwilling to conclude that Congress gave the courts a free hand to deal with so sensitive and controversial a problem or invited them to assume the role of political overseer of the other branches of Government. Accordingly, we affirm the District Court's dismissal of appellant's first claim."
> (Pet. App., p. 24a).

ARGUMENT

Petitioners assert as the reasons for granting a writ of certiorari in this case that (1) the decision of the court of appeals is in conflict with this Court's decision in *Baker* v.

Carr, 369 U.S. 186 (1962), and that (2) the decision of the court below creates a conflict in the circuits with a 1970 decision of the Seventh Circuit Court of Appeals. Neither of those alleged justifications for the grant of a writ withstands the slightest scrutiny.

In assessing the boundaries of the political-question doctrine the court of appeals specifically relied on the "prominent characteristics of political questions" as set forth by this Court in *Baker* v. *Carr,* supra, at 127, on the basis of which the court below concluded:

> "We perceive no 'textually demonstrable commitment' of the issue before us to any other branch of the Federal Government. Nor do we believe that judicial review of congressional employment decisions necessarily involves a 'lack of the respect due coordinate branches of government.' We do find, however, a complete absence 'of judicially discoverable and manageable standards for resolving' the question whether Senators may use paid staff members in their campaign activities." (Footnotes omitted; Pet. App., p. 12a).

Thus, not only is the decision of the court below *not* in conflict with *Baker* v. *Carr,* supra, but rather relies on it and is consonant with it.

But petitioners' real argument on this point is not based on a conflict of the court of appeals' decision with a holding of this Court, but is instead based on petitioners' displeasure that the Senate has not laid down the guidelines necessary to a judicial determination. (See Petition, p. 9: "If the Senate does not restrict campaign activities of staff, then Senators will maintain their built- in advantage over challengers.").

The fact of the matter is, however, that the Senate has not seen fit to restrict staff in the area of campaign activity except with respect to receipt of campaign funds. And that was accomplished by Senate Rule XLIII, adopted in 1966.[2]

As summarized by the Court below:

> "Quite significantly the Senate Select Committee on Standards, in recommending Rule 43, noted the high degree of personal allegiance owed a member of Congress by his immediate staff, and the undesirability of interference with a Member's discretion in assigning duties to staff personnel. Resultantly, the Committee disavowed any intention to deter campaign activity by Senate employees beyond involvement with campaign monies. The floor debate on Resolution 266 similarly was a reaffirmation that a Senator's staff was generally free to assist in his reelection

[2]Rule XLIII of the Standing Rules of the Senate provides "1. No officer or employee whose salary is paid by the Senate may receive, solicit, be the custodian of, or distribute any funds in connection with any campaign for the nomination for election, or the election of any individual to be a Member of the Senate or to any other Federal office. This prohibition does not apply to any assistant to a Senator who has been designated by that Senator to perform any of the functions described in the first sentence of this paragraph and who is compensated at a rate in excess of $10,000 per annum if such designation has been made in writing and filed with the Secretary of the Senate. The Secretary of the Senate shall make the designation available for public inspection." (See Senate Manual, 93rd Cong., 1st Sess., Sen. Doc. No. 93-1, 1973). Respondent Sobsey had been designated by respondent Cannon as his assistant to handle campaign contributions, and such was duly filed with the Secretary of the Senate. (Appellant's App., in the Court of Appeals, p. 22).

> efforts. Both Senator Stennis, the chairman of the Select Committee, and Senator Cooper, a member of the Committee, emphasized that, except for fundraising, the Committee had imposed no limits on staffers' campaign activities." (Footnotes omitted; Pet. App., pp. 14a-15a).

During the Debate on Resolution 266, Senator Stennis pointed out that a proposal had been made not to let the staff members have anything to do with a Senator's reelection. "However, we unanimously opposed that on the simple ground that the staff is a necessary part of the operation and must work up the facts on which the Senator acts . . . So we totally ruled out the idea of prohibiting staff members from taking part in the campaigns for the nomination or renomination of Senators." 114 Cong. Rec. 6836, (1968).

And, in the same debate, Senator Stennis noted that there is "no prohibition on any staff member any time during a campaign. Their pay is not to be stopped . . . unless they . . . violate the rule about money, receiving or soliciting funds. . . ." 114 Cong. Rec. 6838 – 6839 (1968).

It was not until 1977[3] that the Senate next began to reconsider the role of staff in Senatorial campaigns. A Special Committee on Official Conduct reviewed the matter anew in its report issued on October 17, 1977, concluded that "other than the handling of campaign funds, the Senate has not imposed any restrictions on the participation of a member of a Senator's staff in that Senator's reelection campaign." S. Rep. No. 95-500, 95th Cong., 1st Sess., p. 2. (And see the summary of the court below, Pet. App., pp. 16a-21a).

---

[3]The campaign involved in the complaint in this case was, of course, in 1976.

As noted by the court of appeals, the Committee announced in that report "its intention to study, as the second stage of its work, the role of staff members in political campaigns – a project in which the Committee presumably is still engaged." (Pet. App., p. 21a).

It is thus apparent that the Senate has been unwilling to restrict the use of staff in reelection campaigns, except as to receipt of political contributions. The legislative history of Senate Rule XLIII demonstrates the preposterous nature of the petitioners' underlying theory of this action and fully supports the conclusion of the court below in affirming the dismissal of petitioner's complaint.

II

Petitioners next claim a conflict in the circuits by virtue of the decision of the court below in this case and that of the Seventh Circuit in *Shakman* v. *Democratic Organization of Cook County,* 435 F.2d 267 (1970).

Shakman accorded standing to an independent political candidate, and a supporter, to challenge alleged abuses of the patronage practice which utilized the incumbent party's position to coerce political support through threats of dismissal for failure to participate. *Shakman* was a 2-1 decision, with Judge Swygert dissenting on the ground of inappropriateness of judicial intervention.

Shakman is clearly distinguishable from the case at bar. It did not, of course, involve the False Claims Act. In addition, it "dealt with an identifiable system of abuses, involving a single county, not a coordinate branch of the federal government. Additionally, the district court, on remand, was aided by a consent judgment entered into by a number of the defendants. The district court left open, for

further developments, the remedy to be applied in Shakman." *Winpisinger* v. *Watson,* 628 F.2d 133, at 141 (C.A.D.C., 1980).

Aside from the foregoing distinguishing characteristics of *Shakman,* which turned on the issue of standing to sue, it is also noted that the district court in *Winpisinger* v. *Watson,* 86 F.R.D. 77 (D.C. D.C., 1981), pointed out that the Seventh Circuit's opinion in *Shakman* was implicitly modified by that Circuit's later opinion in *Mulqueeny* v. *National Commission on the Observance of International Women's Year,* 549 F.2d 1115 (7th Cir., 1977). In the latter case the Seventh Circuit, in application of later decisions of this Court on standing (e.g., *Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. 59 (1978)), held that plaintiffs' failure to establish both injury in fact and the necessary causal connection deprived them of standing.

In any event, *Shakman* turned on standing while the case at bar turned on prudential considerations. The decision of the court below clearly creates no conflict in the Circuits.

CONCLUSION

The decision of the court below affirming the dismissal of the complaint is not in conflict with any opinion of this Court or of another circuit court of appeals. The decision of the court below is clearly correct in its determination that the Senate itself has been indisposed to lay down guidelines on the use of Senatorial staff in reelection campaigns (except as to the receipt of contributions), and the matter is, in the circumstances, inappropriate for judicial scrutiny. There is no occasion for this Court to review the careful determination by the court below, and the petition for writ of certiorari should be denied.

Respectfully submitted,

Edward P. Morgan

Kevin T. Maroney

WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondents.